STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Sawyer, P.J., O'Connell and Smolenski, J.J.

LISA ROBERTS,
Plaintiff-Appellee,

Supreme Court Nos. 122312
122335
122338

Court of Appeals No. 212675

v

Mecosta County Circuit Court
No. 97-12006-NH
Hon. Lawrence C. Root

MICHAEL ATKINS, M.D.,
Defendant-Appellant,

and

MECOSTA COUNTY GENERAL HOSPITAL, GAIL A. DESNOYERS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., f/k/a GUNTHER, DESNOYERS & MEKARU,
Defendants.
_____/

BRIEF ON APPEAL OF

DEFENDANT-APPELLANT MICHAEL L. ATKINS, M.D.

ORAL ARGUMENT REQUESTED

Submitted By:

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II. STATEMENT OF THE BASIS OF JURISDICTION

JURISDICTION IS CONFERRED UPON THIS HONORABLE COURT BY VIRTUE OF MCR 7.301(2) AND 7.302. DEFENDANT-APPELLANT MICHAEL L. ATKINS, M.D. FILED A PETITION FOR LEAVE TO APPEAL FROM A PUBLISHED OPINION OF THE COURT OF APPEALS DATED AUGUST 27, 2002, ON REMAND FROM A DECISION OF THIS HONORABLE COURT DATED APRIL 24, 2002. THE INSTANT PETITION FOR LEAVE WAS GRANTED ON MARCH 25, 2003.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. **DID THE COURT OF APPEALS CLEARLY ERR IN SUMMARILY CONCLUDING THAT PLAINTIFF-APPELLEE'S PURPORTED MCL 600.2912b NOTICE OF INTENT FULLY COMPLIED WITH THE STATUTORY REQUIREMENTS IN DIRECT CONTRAVENTION OF THIS HONORABLE COURT'S APRIL 24, 2002 RULING AND THE PLAIN LANGUAGE OF THE STATUTE ITSELF?**

1. Defendant-Appellant Atkins says "Yes."

2. Plaintiff-Appellee says "No."

3. The Court of Appeals simply ignored this Honorable Court's directive and made an "end-around" its April 24, 2002 Opinion by summarily and erroneously concluding that Plaintiff-Appellee's purported Notice(s) of Intent fully complied with the statutory requirements of MCL 600.2912b.

B. **IS A PURPORTED NOTICE OF INTENT FAILING TO FULLY COMPLY WITH THE PROVISIONS OF MCL 600.2912b(4) IN CLEAR VIOLATION OF THE STATUTE OR DOES SOME LESSER STANDARD, SUCH AS "SUBSTANTIAL COMPLIANCE," SUFFICE?**

1. Defendant-Appellant Atkins says this Honorable Court has historically and consistently applied a standard of full compliance and any deviation from that standard would unsettle established precedent and be contrary to the plain meaning of MCL 600.2912b(4).

2. Plaintiff-Appellee, despite the lack of precedent, particularly in medical liability cases, says some lesser standard should apply.

3. The Court of Appeals did not make a ruling on whether some lesser standard of compliance was somehow applicable, but effectively allowed such a result by summarily and erroneously concluding that Plaintiff-Appellee's purported Notice(s) of Intent fully complied with the statutory requirements of MCL 600.2912b(4).

IV. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a medical malpractice action by Plaintiff-Appellee Lisa Roberts ("Plaintiff") in which she alleges, in part, that Defendant-Appellant Michael L. Atkins ("Defendant Atkins") was negligent in failing to diagnose and treat an ectopic (tubal) pregnancy during an emergency department visit to Defendant-Appellee Mecosta County General Hospital ("Defendant MCGH" or "MCGH") on October 8, 1994. Defendant Atkins is an emergency physician who happened to be working in the Defendant MCGH emergency department on October 8, 1994, when plaintiff presented [Appendix 1A-5A (BEST COPY AVAILABLE)]. Defendant Atkins is identified in the MCGH medical records as the treating emergency physician in no less than five (5) places [Appendix 1A-5A (highlighted in yellow)]. Also named in this litigation were the obstetricians who treated Plaintiff at their office on different dates.

On or about August 15, 1996, Plaintiff mailed a purported "Section 2912 Notice of Intent to File Claim" (the "First Notice of Intent") to Defendant MCGH through a prior attorney [Appendix 6A-8A]. As this Honorable Court will note, **the purported First Notice of Intent does not even name or otherwise identify Defendant Atkins**. This purported First Notice of Intent also does not set forth the standard of care applicable to Defendant Atkins, how that standard of care was violated by Defendant Atkins, what steps he should have taken to comply with the standard of care, or the manner in which the alleged breach of the standard of care proximately caused the injury. In addition, the First Notice of Intent, under the heading "FACTUAL BASIS FOR CLAIM," limits the claim for negligence to events occurring on October 4, 1994 (and not on October 8, 1994, when plaintiff was treated by Defendant Atkins in the MCGH emergency department, *see e.g.*, the MCGH Emergency Department medical records, Appendix 1A-5A):

"1. FACTUAL BASIS FOR CLAIM

This is a claim for negligence which occurred on October 4, 1994, at Mecosta County General Hospital. It is claimed that on said date . . .

[Appendix 7A, ¶ 1 (emphasis added)]

Neither Defendant Atkins, nor anyone on his behalf, responded to this purported First Notice of Intent.

On or about September 19, 1996, Plaintiff mailed an "Amended Section 2912b Notice of Intent to File Claim" (the "Second Notice of Intent") [Appendix 9A-10A]. This purported Second Notice of Intent has no relevant differences than the purported First Notice of Intent and, again, along with the various other deficiencies, nowhere is Defendant Atkins named or identified whatsoever on this document [Appendix 9A-10A]. Neither Defendant Atkins, nor anyone on his behalf, responded to this purported Second Notice of Intent.

On or about September 23, 1996, Plaintiff mailed a **third** purported "Section 2912b Notice of Intent to File Claim" (the "Third Notice of Intent") [Appendix 11A-13A]. Although this purported Third Notice of Intent identifies Defendant Atkins as a treating physician and was apparently sent to him, it does not set forth the standard of care applicable to Defendant Atkins, how that standard of care was violated by Defendant Atkins, what steps he should have taken to comply with the standard of care, or the manner in which the alleged breach of the standard of care proximately caused the injury [Appendix 11A-13A]. In fact, this purported Third Notice of Intent specifically limits the "allegations" of negligence to **other** Defendants:

"2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

Claimant contends that **the applicable standard of care required that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC,** provide the Claimant with the

services of competent, qualified and licensed staff or physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standards of care.

3. THE MANNER IN WHICH IT IS CONTENDED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED

Claimant claims that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC failed to provide her with the applicable standard of practice and care outlined in paragraph 2 above."

[Appendix 12A, ¶ 2 and 3 (emphasis added)]

Moreover, this purported Third Notice of Intent also limited itself for claims of negligence on October 4, 1994 at Obstetrics & Gynecology of Big Rapids (and not October 8, 1994, when this patient was treated by Defendant Atkins in the MCGH emergency department, *see e.g.,* the MCGH Emergency Department medical records, Appendix 1A-5A):

"1. FACTUAL BASIS FOR CLAIM

This is a claim for negligence which occurred on October 4, 1994, at Obstetrics & Gynecology of Big Rapids. It is claimed that on said date, while pregnant with her first child, Claimant presented herself to Barb Davis, PAC, Dr. Michael Atkins, and Dr. Gail DesNoyers complaining of severe abdominal pain and bleeding. At that time a diagnosis of a spontaneous abortion was made and a D & C was performed at Mecosta County General Hospital. Claimant was sent home at that time, despite Dr. DesNoyer's knowledge of Claimant's history of a prior ectopic pregnancy.

Over the course of the next few days, Claimant continued to experience pain and cramping and, on October 7, 1994, was seen at Mecosta County General Hospital by Dr. Michael Atkins. Claimant was told that the pain she was experiencing was cramps from the D & C she had done and was sent home.

Claimant returned to the hospital on October 8, 1994, wherein it was discovered that Claimant had not had a spontaneous abortion

but had an ectopic pregnancy in her left tube which had burst. Emergency surgery was performed at that time and her left tube was removed.

Claimant had her right tube removed approximately ten years ago and, as a result of the negligence set forth above, she is now unable to have any children."

[Appendix 12A, ¶ 1 (emphasis added)]

Additional Plaintiff attempts at providing the requisite notice requirements included:

"4. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE

See paragraph 2 above.

5. MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY

See paragraph 2 above."

[Appendix 13A, ¶ 4 and 5]

Defendant Atkins did not receive this purported Third Notice of Intent until after this litigation was commenced and never responded (either directly or through someone else on his behalf).

On February 25, 1997, Plaintiff filed a Summons and Complaint initiating this litigation against the listed Defendants [Appendix 14A-27A]. Thereafter, Defendants Atkins and MCGH filed Motions for Summary Disposition seeking dismissal of the lawsuit for, among other things, failure to toll the statute of limitations through lack of compliance with the notice requirements of MCL 600.2912b. The motion filed by Defendant Atkins was granted by the lower court pursuant to an "Order Granting Motion for Summary Disposition (Expiration of Statute of Limitations)" dated September 5, 1997 [Appendix 85A-86A]. Defendant MCGH was dismissed on similar grounds pursuant to an "Order" dated September 10, 1997 [Appendix 87A-88A]. Plaintiff sought

and was granted a Rehearing on these Motions by an Opinion and Order of the Mecosta County Circuit Court dated October 22, 1997 [Appendix 177A-178A].

After all parties extensively briefed the issues as directed by the Mecosta County Circuit Court, an "Opinion of the Court" was issued by the Hon. Lawrence C. Root on May 6, 1998 [Appendix 181A-191A]. As this Honorable Court will note, in an extensive and well-reasoned opinion, the Trial Court upheld its prior ruling as to Defendants Atkins and MCGH and granted the Motion for Summary Disposition filed by the remaining Defendants. A final "Order of Dismissal with Prejudice" was entered on June 17, 1998, and it is from this Order that Plaintiff originally appealed [Appendix 192A-194A].

In the Court of Appeals (and for the very first time in this litigation), Plaintiff raised the "issue" of waiver, and claimed, among other things, that each of the Defendants waived their right to contest the various purported Notices of Intent. The Court of Appeals agreed and reversed the Trial Court in an Opinion dated March 3, 2000, and proclaimed a sweeping new rule of law on waiver:

> "Accordingly, we hold that any objections to a Notice of Intent under § 2912b(1) must be raised before the filing of the complaint. Summary disposition is not appropriate based upon any alleged defect in the Notice of Intent not raised by the defendant before the filing of the complaint. In other words, if the defendant does not object to the notice before litigation is filed, then the Notice must have been adequate to guide the defendant through the pre-complaint investigation and negotiation stage. In such case, there is no reason for the trial court to inquire into the adequacy of the Notice after the complaint is filed."
>
> [Appendix 201A-202A]

In that opinion, that Court of Appeals declined to rule on the sufficiency of the purported Notice(s) of Intent.

An appeal from the Court of Appeals' decision was taken to this Honorable Court and leave was granted. As this Honorable Court may recall, during oral argument in this Court on October 10, 2001, several Justices expressed rather serious reservations about Plaintiff's argument that the purported Notice(s) of Intent complied, substantially or otherwise, with the statutory requirements of MCL 600.2912b.

On April 24, 2002, this Honorable Court issued its Opinion reversing the Court of Appeals' March 3, 2000 decision and remanded this case back to the Court of Appeals for further proceedings [Appendix 204A-220A]. This Honorable Court was quite emphatic in its ruling:

> "This case again calls into question the authority of courts to create terms and conditions at variance with those unambiguously and mandatorily stated in a statute. We reaffirm that the duty of the courts of this state is to apply the actual terms of an unambiguous statute . . .
>
> We hold that the statute of limitations cannot be tolled under MCLA 600.5856(d) unless notice is given in compliance with **all** the provisions of MCLA 600.2912b. We further hold that MCLA 600.2912b places the burden of complying with the notice of intent requirements on the plaintiff and does not implicate a reciprocal duty on the part of the defendant to challenge any deficiencies in the notice before the complaint is filed. In addition, because MCLA 600.5856(d) is a tolling provision and a plaintiff relies on a tolling provision to negate a statute of limitations defense raised by a defendant, a defendant does not need to assert the defense or challenge a plaintiff's compliance with MCLA 600.2912b, as required by MCLA 600.5856(d), until the plaintiff files suit. For these reasons, we reverse the Court of Appeals opinion and remand this matter for further proceedings consistent with this opinion."
>
> [Appendix 204A-205A (emphasis added)]

So there could be no mistake as to its intent and holding, this Honorable Court also concluded by saying:

IV. Conclusion

> In light of the plain language of MCLA 600.5856(d), we conclude that the statute of limitations in a medical malpractice action is not tolled unless notice is given in compliance with **all** the provisions of MCLA 600.2912b. We further conclude that MCLA 600.2912b did not require defendants to object to the sufficiency of the notices of intent before the filing of the complaint. In addition, because MCLA 600.5856(d) is a tolling provision and tolling provisions work to negate a statute of limitations defense raised by a defendant, defendants did not need to assert the defense or challenge plaintiff's compliance with MCLA 600.2912b, as required by MCLA 600.5856(d), until plaintiff filed suit.
>
> Accordingly, we reverse the judgment of the Court of Appeals and, recognizing that the panel did not reach a determination regarding whether the trial court erred in concluding that plaintiff's notices of intent did not comply with Section 2912b(4), we remand this matter to the Court of Appeals for further proceedings consistent with this opinion."
>
> [Appendix 219A-220A (footnote omitted, emphasis added)]

Based upon this ruling, the **only** issue to be decided by the Court of Appeals on remand was whether or not the purported Notices of Intent complied with **all** the requirements of MCL 600.2912b(4), i.e., **full** compliance.

Incredibly, the Court of Appeals (on remand) concluded that the purported Notice(s) of Intent strictly complied with MCL 600.2912b, and again reversed the Trial Court, prompting this appeal. In so concluding, the Court of Appeals apparently reasoned that the requisite information could somehow be "gleaned" from the Notices of Intent, and clearly made its own interpretation of the Notices of Intent, reading into them and making assumptions as to their scope and content. Ultimately, the Court of Appeals went out of its way and made an "end around" this Honorable Court's prior opinion, and erroneously concluded plaintiff's purported Notice(s) of Intent complied with the statutory requirements of MCL 600.2912b(4).

V. LEGAL ARGUMENTS

A. THE COURT OF APPEALS CLEARLY ERRED IN SUMMARILY CONCLUDING THAT PLAINTIFF-APPELLEE'S PURPORTED MCL 600.2912b NOTICE OF INTENT FULLY COMPLIED WITH THE STATUTORY REQUIREMENTS IN DIRECT CONTRAVENTION OF THIS HONORABLE COURT'S APRIL 24, 2002 RULING AND THE PLAIN LANGUAGE OF THE STATUTE ITSELF.

In comparison to what the parties and courts have been through to date, the analysis of whether or not Plaintiff complied with **all** the requirements of MCL 600.2912b(4) should have been relatively easy. The statutory mandate is quite clear:

> 4. The notice given to a health professional or health facility under this section **shall contain** a statement of **at least** all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health care professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.
>
> [MCL 600.2912b(4) (emphasis added)]

As to the purported First and Second Notices of Intent, at least as to Defendant Atkins, not only are they substantively fatally deficient, but also they are excluded from consideration since he was not named:

> The language of MCLA 600.5856(d); MSA 27A.5856(d) clearly provides that the statute of limitations is tolled if the notice of intent to sue is given "in compliance with section 2912b." (Emphasis added.) The negative implication of this section is that the statute of limitations is not tolled if the notice of intent to sue does not comply with §2912b. The Legislature's use of the word "shall" in subsection 4 of §2912b makes mandatory the inclusion of the "names of all health professionals" notified of an intention to sue. See, e.g., *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997) (explaining the use of the word "shall" indicates a mandatory, rather than a discretionary, provision). When understood in its plain and ordinary sense, the word "name" does not encompass the broad description of defendant Vandenberg that was included in the sixth paragraph of plaintiffs' notice of intent to sue. This is so even when that broad description is considered in conjunction with the more specific factual description included in paragraph one of the notice. **Simply put, a description is not a name. Because the specific statutory language of §2912b is clear and unambiguous, we are bound to apply it as written. By failing to include defendant Vandenberg's "name" in their notice of intent to sue, plaintiffs failed to comply with a specific mandatory requirement of §2912b(4). Therefore, the statute of limitations was not tolled pursuant to MCLA 600.5856(d); MSA 27A.5856(d), and plaintiffs' complaint naming Vandenberg as a defendant was not timely filed.**
>
> [*Rheaume v Vandenberg,* 232 Mich App 417, 422-23 (1998) (emphasis added)]

Obviously, consistent with *Rheaume*, since Defendant Atkins was not "named" in either the First or Second Notices of Intent, Plaintiff did not comply with MCL 600.2912b(4), and those notices did not toll the statute of limitations, as the Trial Court correctly ruled.

Accordingly, the sole remaining issue is whether the purported Third Notice of Intent complied with **all** notice provisions of MCL 600.2912b(4), i.e., **full** compliance, consistent with the plain meaning of the statute and as mandated by this Honorable Court in its April 24, 2002

Opinion. The answer is an emphatic "No." The defects in the purported Third Notice of Intent are both profound and, ultimately, fatal.

As previously noted, and as this Honorable Court may recall, during oral arguments in this Court on October 10, 2001, several Justices expressed rather serious reservations about Plaintiff's argument that the purported Notice(s) of Intent complied with the statutory requirements of MCL 600.2912b. This was supported by this Honorable Court's directive to the Court of Appeals that it review the various Notices of Intent with the directive that **all** provisions of MCL 600.2912b be complied with. *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 64; 642 NW2d 663 (2002).

As to the purported Third Notice of Intent and Defendant Atkins in particular, Plaintiff complied with **none** of the notice requirements, save the one requiring Defendant Atkins to be listed as an individual receiving notice. First, MCL 600.2912b(4)(a) requires a statement of the factual basis for the claim. Presumably, this statement should be related to the factual circumstances surrounding the prospective defendant. Certainly, the Legislature intended that a potential defendant be given accurate information related to his or her specific care and treatment. Plaintiff specifically and affirmatively factually represented in the purported Third Notice of Intent that the instant claim is based on negligence occurring on October 4, 1994, at this patient's obstetrician's office:

> "1. FACTUAL BASIS FOR CLAIM
>
> **This is a claim for negligence which occurred on October 4, 1994 at Obstetrics & Gynecology of Big Rapids**. . . ."
>
> [Appendix 12A (emphasis added)]

It is not disputed that Defendant Atkins treated plaintiff on October 8, 1994 (not October 4 or 7 as the defective purported Third Notice of Intent states, *see e.g.*, the MCGH Emergency

Department medical records, Appendix 1A-5A) at the MCGH Emergency Department (not at Obstetrics & Gynecology, the office of plaintiff's obstetricians, which is a completely separate location from the MCGH Emergency Department). Clearly, this "factual basis" described in the purported Third Notice of Intent failed in its essential purpose to describe the facts upon which a claim could be made against Defendant Atkins and, in fact, was misleading as to date and location of his involvement.

Should this Honorable Court think this position is somehow unfair, please reference the MCGH Emergency Department Medical Records [Appendix 1A-5A]. Defendant Atkins is listed as the treating emergency physician on October 8, 1994, no less than five (5) times (highlighted in yellow). This is not rocket science. All Plaintiff needed to do was conduct a rather simple review of these records (consisting of only five (5) pages) already obviously in her possession. Throughout the numerous trial court arguments and appeals, Plaintiff has never been able to adequately respond to this basic and fundamental fact. As it was, however, Plaintiff misidentified the date and location of the care and treatment of Defendant Atkins, leaving her purported Third Notice of Intent not in compliance with and fatally flawed as to the first required element of MCL 600.2912b(4).

Even if one is able to look past the misleading factual basis for a claim as to Defendant Atkins, and give Plaintiff the benefit of the doubt based on her general description of the MCGH emergency department treatment (albeit on an erroneous date), Plaintiff simply, clearly and undeniably fails the second element.

The second element of MCL 600.2912b(4)(b) requires a statement of the applicable standard of practice of care alleged. Plaintiff not only fatally fails to set forth a specific standard of practice as to **any** care-giver (much less than that of an emergency physician) in the purported

Third Notice of Intent, but she again specifically limits the purported standard of practice to this patient's obstetricians, Obstetrics & Gynecology of Big Rapids and its agents:

> "2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED.
>
> Claimant contends that the applicable standard of care required that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, provide the Claimant with the services of competent, qualified and licensed staff . . ."
>
> [Appendix 12A, ¶ 2 (emphasis added)]

Analogous with the *Rheaume* case, *supra,* Defendant Atkins, an emergency physician by trade, is not even identified at all, much less as having any standard of practice or care attributable to him as an emergency physician. This section, which really sets forth no standard of practice at all, should have set forth the standard of care of an emergency physician on October 8, 1994, at MCGH; i.e., what allegedly should have been done to examine, test and treat this patient in the emergency department of a reasonably prudent emergency physician. Contrary to the claim of the Court of Appeals, there is no standard of care as to an emergency physician established anywhere else, either. As previously suggested, the purported Third Notice of Intent was actively misleading in that it expressly limited itself to some unspecified claim involving Obstetrics & Gynecology of Big Rapids, an organization with which Defendant Atkins had no relationship, and included an erroneous date of October 4, 1994 (and not October 8, 1994, when this patient was treated by Defendant Atkins in the MCGH Emergency Department).

Again, should this Honorable Court feel this position is unfair, reference is made to the MCGH Emergency Department records, which clearly indicates Defendant Atkins was the emergency physician on no less than five (5) places [Appendix 1A-5A]. Medical malpractice claims usually start with a review of the medical records. That is where this Court's analysis

ought to start as well, particularly as to Defendant Atkins. While the result of a dismissal may be harsh, this is not a case where the information was difficult to obtain or ascertain. The identity of this potential defendant was clear and Dr. Atkins even dictated his findings so there were no "identity," "handwriting," or "legibility" issues.

The third element of MCL 600.2912b(4) (c) requires a statement of the manner in which it is claimed that the applicable standard of practice or care was breached. Again, not only was there no standard of practice violation set forth as to any potential defendant (much less than that of an emergency physician), but the statement that was made limited itself to parties other than Defendant Atkins:

> 3. THE MANNER IN WHICH IT IS CONTENDED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED.
>
> Claimant claims that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, failed to provide her with the applicable standard of practice and care outlined in paragraph 2 above.
>
> [Appendix 13A, ¶ 3]

Under no stretch of the imagination (the most recent opinion of the Court of Appeals notwithstanding) does this statement even remotely comply with the specific statutory requirement to set forth how the applicable standard of care of an emergency physician was breached, particularly as to Defendant Atkins, whom it does not even address. Furthermore, it incorporates the fatally flawed paragraph 2, which references some unspecified claim involving another party on a date of treatment different from when Defendant Atkins treated this patient.

Plaintiff compounded her problems by incorporating the already fatally deficient paragraph 2 into the two (2) remaining statutorily required elements:

"4. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE.

See paragraph 2 above.

5. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY.

See paragraph 2 above.

[Appendix 13A, ¶ 4 and 5]

The requirements of a Notice of Intent also include: (1) what action should have been taken to achieve compliance with the applicable standard of care, and, (2) the manner in which the alleged breach was the proximate cause of the injury. MCL 600.2912b(4)(c) and MCL 600.2912b(4)(d). Instead of setting forth these requirements specifically, Plaintiff simply incorporated the fatally flawed paragraph 2, with no attempt whatsoever at addressing these two (2) critical elements as to any Defendant, much less Defendant Atkins, an emergency physician. Obviously, the purpose and intent of the Michigan Legislature in enacting these requirements was to force a prospective plaintiff to investigate what actions should have been taken by the specific health care provider being identified as a potential defendant, and undertake an analysis of whether or not the case had merit from a proximate cause standpoint. Obviously, neither of these legislative purposes was achieved in the instant case as Plaintiff simply ignored these requirements.

On remand, Plaintiff made two (2) arguments: (1) that the six statutorily mandated notice of intent requirements can somehow be "gleaned" from the purported Third Notice of Intent; and (2) that the Court of Appeals should adopt a "substantial compliance" standard of review. The Court of Appeals did not address the second argument as it (incredibly) concluded that the purported Notice(s) of Intent strictly complied with the statute and contained all the requisite

elements. The idea that all the elements can be "gleaned" from the purported Third Notice of Intent is ludicrous. Not only is the factual basis of the claim misleading as to Defendant Atkins (wrong date, wrong place of treatment, wrong parties), but elements (b) (standard of care of an emergency physician); (c) (the manner in which the emergency medicine standard of care was breached); (d) (what action should have been taken by this emergency physician); and (e) (how the error by the emergency physician was the proximate cause of the injury) **are omitted altogether.** These purported elements cannot be "gleaned" from the Third Notice of Intent because they do not exist. Answers to the following fundamental and statutorily mandated questions are lacking:

- What was the standard of care of an emergency physician in treating this patient (assuming one cites the correct date and location)?
- How did this emergency physician (or any of the Defendants for that matter) violate the standard of care?
- What should this emergency physician have done to treat this patient in compliance with the standard of care?
- How was this emergency physician's unspecified act(s) or omission(s) a proximate cause of this patient's alleged adverse outcome?

It is these unanswered questions that causes the purported Third Notice of Intent to be fatally deficient, and is ultimately why the statute of limitations was not tolled in this case.

What makes the latest opinion of the Court of Appeals so outrageous is the suggestion by that court that it was somehow Defendant Atkins' responsibility to identify the correct standard of care to apply to Plaintiff's purported Third Notice of Intent:

> Defendants argue that this statement of the standard of care is inadequate. However, defendants direct us to no authority to establish that the stated standard of care is

> incorrect, nor do they direct us to the proper standard of care. We are reluctant to declare plaintiff's standard of care inaccurate without being able to identify what is the proper standard of care.
>
> [Court of Appeals Opinion on Remand, Appendix 224A]

The Court of Appeals then goes on (as to the second element (b), the standard of care) to suggest that an erroneous standard of care is acceptable so long as some standard is set forth. In this case as to Defendant Atkins, at least, such an argument is disingenuous **as there was no standard of care whatsoever alleged to Dr. Atkins**, much less one applicable to an emergency physician. The purported Third Notice of Intent also restricted itself to acts or omissions of parties other than Dr. Atkins (*see supra*).

As to elements (c), (d) and (e) the Court of Appeals engaged in a pitifully strained analysis concluding that, taken as a whole, all elements were included in the purported Third Notice of Intent. This is "judicial gloss" at its worst. Under no circumstances were elements (c), (d) and (e) met in this case. As argued above, the critical and statutorily mandated questions as to the emergency physician, Dr. Atkins, went fatally unanswered in this case. Accordingly, there was no compliance, **fully, strictly, substantially or otherwise**, with MCL 600.2912b in this case.

Quite frankly, the Court of Appeals wanted to reach a result in this case and was going to do it one way or another. In its headlong rush to reach its desired result, the Court of Appeals ignored the statutory elements and the mandate of this Honorable Court that **all** such elements must be met. Consequently, the Court of Appeals has made bad law, sending an erroneous message to all medical liability practitioners and courts of this state that inadequate, inaccurate, poorly drafted and misleading Notice(s) of Intent will be allowed in this state – despite the clear and unambiguous requirements of MCL 600.2912b and numerous court decisions, including a

very clear mandate from this Honorable Court. This cannot be allowed and Defendant Atkins strongly urges this Court to immediately reverse the Court of Appeals and affirm the Opinion of the Mecosta County Circuit Court.

B. A PURPORTED NOTICE OF INTENT FAILING TO FULLY COMPLY WITH THE PROVISIONS OF MCL 600.2912b(4) IS IN CLEAR VIOLATION OF THE STATUTE.

[Although Defendant Atkins is steadfast in his position that in this action there was **no compliance**, fully, strictly, substantially or otherwise, with the Notice of Intent requirements of MCL 600.2912b(4), because this Honorable Court, in its March 25, 2003 Order, asked the parties to brief the issue of whether strict compliance or some lesser standard of compliance applies to plaintiff's notice of intent under that provision, an analysis of that issue follows. Also, there appears to be some confusion as to the standard of compliance to be applied to MCL 600.2912b(4) in this case. At some points the term "strict compliance" has been used and at others "full compliance" has been asserted. It is the position of Defendant Atkins that the term "strict compliance" is synonymous with "full compliance," but that the term "full compliance" is probably the correct term, and will therefore be the vernacular set forth in this brief.]

Statutory construction does not permit anything less than full compliance with the clear and unambiguous provisions of MCL 600.2912b(4). This is an instance in which the Legislature could not have imposed more precise requirements. If it had been the Legislature's intention to require anything less than full compliance with its requirements, it would have expressly stated as much. The statute sets forth no language suggesting that anything less than full compliance with its terms is sufficient. In fact, as discussed below, just the opposite is true. Consequently, a Notice of Intent failing to fully comply with the provisions of MCL 600.2912b(4) is in clear violation of the statute.

As this Honorable Court emphasized in its initial ruling in this case, *Roberts, supra,* 466 Mich at 63, "an anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature." To effect the intent of the Legislature requires an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then it is assumed that the Legislature intended its plain meaning and "**the statute is to be enforced as written**." *Sanders v Delton Kellogg Schools,* 453 Mich 483, 487; 556 NW2d 467 (1997). *See also People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary consequence of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). Furthermore, when construing a statute, the court must presume every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Tp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

Historically, this Honorable Court has been resolute in its determination that "[i]t is cardinal rule of statutory construction that a clear an unambiguous statute warrants no further interpretation and **requires full compliance with its provisions, as written**." *Northern Concrete Pipe, Inc, supra,* 461 Mich at 321 (emphasis added). In its previous decision in this very case, this Honorable Court confirmed that MCL 600.2912b is "clear and unambiguous" and reaffirmed that that "a clear an unambiguous statute warrants no further interpretation and **requires full compliance with its provisions, as written**" and that it is "the duty of the courts of

this state is to apply the **actual** terms of an unambiguous statute."[1] *Roberts, supra* at 58 (emphasis added). Accordingly, whether full compliance with the terms of MCL 600.2912b(4) is required is not an issue of construction, but one of application. Because the statute at issue is clear and unambiguous concerning its requirements for a Notice of Intent, Defendant Atkins asserts that full compliance with its terms is mandatory and must be applied in this case.

Where the Legislature has deemed anything less than full compliance with its unambiguous statutory provisions acceptable, it has specifically articulated that intention. For example, in the Construction Lien Act, MCL 570.1302(1), the Legislature deliberately provided an exception to the requirement of full compliance in the form of an express "substantial compliance" provision, stating:

> This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. **Substantial compliance with the provisions of this act shall be sufficient** for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them (emphasis added).

Of further significance, even in instances where the Legislature has expressly set forth a "substantial compliance" provision, this Honorable Court has maintained adherence to the principle of full compliance. For example, in *Northern Concrete Pipe,* the Court of Appeals, in a divided panel, found that substantial compliance with the statutorily prescribed 90-day filing deadline was sufficient in light of the MCL 570.1302(1) "substantial compliance" provision [*Northern Concrete Pipe Inc v Sinacola Cos—Midwest Inc,* unpublished opinion per curiam,

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[1] Defendant Atkins notes that under the law of the case doctrine, this Honorable Court's determinations binds lower tribunals because lower tribunals may not take action on remand inconsistent with the judgment of this Court. *Sokel v Nickoli,* 356 Mich 460, 465; 97 NW2d 1 (1959). By failing to apply the "actual terms of an unambiguous statute" and by authorizing a Notice of Intent not in "full compliance with [MCL 600.2912b(4)'s] provisions, as written," the Court of Appeals decision in this case was in direct contravention of this Court's clear mandates and the law of the case doctrine.

issued October 23, 1998 (Docket No. 203322)]. However, this Honorable Court overruled the Court of Appeals in that case, mandating full compliance with the statutorily prescribed filing requirements, emphasizing that any lesser standard of compliance was an exception that should not be effected in order to negate the general full compliance rule, stating:

> [i]t is a cardinal rule of statutory construction that a clear and unambiguous statute warrants no further interpretation and requires full compliance with its provisions, as written. Within the Construction Lien Act, however, the Legislature provided an exception to that rule, in the form of the 'substantial compliance' provision. **As an exception**, this provision should not be interpreted to nullify altogether the general rule that statutes should be interpreted consistent with their plain and unambiguous meaning.
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> [*Northern Concrete Pipe, Inc, supra,* 461 Mich at 320-321(citations omitted) (emphasis added)]

Similarly, it can be presumed that had the Legislature intended to allow a Notice of Intent to contain anything less than what it specifically set forth in MCL 600.2912b(4), it would have expressly limited its compliance requirements accordingly.

In addition, and perhaps even more compelling, MCL 600.2912b(4) contains mandatory provisions. Specifically, MCL 600.2912b(4) provides that "[t]he notice given to a health professional or health facility under this section **shall** contain a statement of at least **all** of the following . . .". MCL 600.2912b(4) (emphasis added). The word "shall" in this statute connotes a mandatory, rather than discretionary, requirement. *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000), adopting *Scarsella v Pollak,* 232 Mich App 61; 591 NW2d 257 (1998). Hence, a party has no choice but to fully comply with the statutory requirements, and the allowance of anything short of full compliance with such mandatory requirements would necessarily be insufficient. For example, although not binding on this Honorable Court, it is worth noting that with respect the statute at issue the Court of Appeals recognized that the Legislatures use of the word "shall" made mandatory the inclusion of the "names of all health

professionals" in all MCL 600.2912b(4) Notices of Intent and that a mere description of the health professionals was not sufficient. *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). Specifically, the *Rheaume* Court, recognizing that anything less than full compliance with the requirements of MCL 600.2912b(4) was in violation of the statute, stated:

> When understood in its plain and ordinary sense, the word 'name' does not encompass the broad description of defendant Vandenberg that was included in the sixth paragraph of plaintiffs' notice of intent to sue. This is even so when the broad description is considered in conjunction with the more specific factual description included in paragraph one of the notice. Simply put, a description is not a name. Because the specific statutory language of 2912b is clear and unambiguous, we are bound to apply it as written.
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> *[Rheaume, supra* at 422-423]

Despite this clear precedent, it has been Plaintiff's (and apparently the Court of Appeal's) unwavering position that a Notice of Intent pursuant to MCL 600.2912b(4) need not contain all of the information set forth in its provisions in order to suffice. However, MCL 600.2912b(4) plainly specifies the **minimum** requirements for a valid Notice of Intent. This Honorable Court agreed with this in its prior decision in the instant action and emphasized that the phrase **"at least"** contained in MCL 600.2912b(4) "plainly reflects a **minimal requirement** . . .". *Roberts, supra* at 66 (emphasis added). "Minimal" is defined as "the smallest in amount or degree; the least possible." The American Heritage Dictionary, New College Edition, p. 835. Accordingly, this Honorable Court, in this very case, has already ruled that nothing less than full compliance with the expressly proscribed minimum requirements of MCL 600.2912b(4) can possibly suffice. In essence, a prospective plaintiff can provide more information than required, but he or she may not provide any less. To hold otherwise, by judicially legislating a lesser standard of compliance with respect to these requirements, would dispense with the clear and unambiguous legislative mandates.

This above reasoning is not only consistent with the plain meaning of the statute, but it is also consistent with the clear intention of the Legislature. Specifically, the Legislature defined the statutory purposes of the notice provisions of the Tort Reform Act of 1993 as follows:

> Advance notice of suit. For the stated purposes of promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs, the bill would require a plaintiff planning to file suit to notify a defendant at least 182 days before commencing court action. The notice could be filed later if a statute of limitations was about to apply. Meeting the 182-day requirement would cover meeting it for future defendants added to the suit. The notice would have to contain certain minimum information about the case and its basis.
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> [Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993; Appendix 246A-247A (emphasis added)]

The Legislative intent behind the enactment of MCL 600.2912b(4)'s Notice of Intent provisions was to promote settlement without the need for formal litigation, and to reduce the cost of medical liability litigation. Accordingly, the Notice of Intent provisions contained in MCL 600.2912b(4) require that a prospective plaintiff identify the foundations of his or her allegations. However, the statute sets forth only the bare minimum requirements for putting a potential defendant on timely, meaningful and accurate notice of future claims so that he or she can effectively consider the allegations and whether settlement is advisable.

An argument can be made that the judicial legislation of any lesser standard than that of full compliance would allow inaccurate, incomplete and speculative information and may essentially permit a Notice of Intent containing virtually no information at all to suffice. This would seriously undermine the purpose of the statute, rendering it nearly impossible for a potential defendant to discern what claims he or she may be subject to in future litigation. On other hand, full compliance with the provisions of MCL 600.2912b(4) would most effectively further the purpose of the statute by ensuring that a potential defendant is accurately informed of,

at minimum, the basic foundation of plaintiff's allegations. In the context of the instant action, it is arguable that **if** Defendant Atkins had been put on effective notice of the allegations against him (which full compliance with the notice requirements of this statute would have achieved), his insurance company would certainly have responded, possibly facilitating the timely, fair and cost effective resolution of this action. Therefore, the purported Third Notice of Intent, not in compliance with the provisions of MCL 600.2912b(4), failed in its essential purpose, plainly undermining the stated legislative intent.

Furthermore, requiring anything less than full compliance with the Notice of Intent provisions set forth in MCL 600.2912b(4) would render its provisions superfluous, in contravention of the well-established rules of statutory construction. *Altman, supra*, 439 Mich at 635. Specifically, anything less than full compliance with the statute, and the corresponding allowance of inaccurate and incomplete information, would impose an affirmative duty on a potential defendant to ascertain not just the nature of the allegations against him, but as in this case, **the very existence** of claims against him. As this was obviously not the intention of the Legislature in its enactment of MCL 600.2129b(4), it would be incongruous and inconsistent to suggest that a plaintiff may issue an incomplete and inaccurate Notice of Intent, placing upon defendant the affirmative responsibility of establishing the allegations against him. This Honorable Court articulated this principle previously in this case as it confirmed that MCL 600.2912b(4) placed the burden squarely on the plaintiff to provide this minimum information, as set forth in the unambiguous provisions of the statute, stating that "[s]ubsections 2912b(1) and (4) clearly place the burden of complying with the notice of intent requirements on the plaintiff." *Roberts, supra* at 66. Accordingly, it is obviously not meant to be a prospective defendant's responsibility to somehow "glean" this requisite information for himself, as plaintiff (and

apparently the Court of Appeals) would suggest by arguing for the allowance of some amorphous "substantial compliance" exception.

Moreover, the judicial legislation of a lesser standard of compliance into MCL 600.2912b(4) would undoubtedly serve to undercut the goals of consistency and predictability sought to be achieved by the Legislature and would undeniably place an immense burden on the courts and disrupt an entire line of well-established precedent.[2] In any case, it would not be sufficient to simply answer the question whether there was full compliance with the terms. Rather, a subjective case-by-case determination would have to be made as to whether less-than-full compliance was nevertheless sufficient. This Honorable Court has previously expressed this concern, recognizing "the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a 'substantial compliance' clause." *Northern Concrete Pipe, supra* at 321.

Although there is no authority excusing plaintiff from full compliance with the plain language of MCL 600.2912b(4), plaintiff nevertheless argued for the application of a lesser standard of compliance, asking to borrow a "substantial compliance" exception from decisions involving early notices to municipalities. *See e.g., Brown v Owosso*, 126 Mich 91; 85 NW 256 (1901), *Meredith v City of Melvindale*, 165 NW2d 7; 381 Mich 572 (1969) and *Hussey v City of*

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[2] It should be noted that in the area of medical liability law, with the exception of the Court of Appeals in the instant case, the rule of full compliance has been diligently followed to date. *See e.g. Holmes v Mich Capital Medical Center*, 242 Mich App 703; 620 NW2d 319 (2000) (plaintiffs failed to fully comply with the affidavit of merit requirements); *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000) adopting *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998) (plaintiff failed to move for an extension to file an affidavit of merit with his complaint before the statute of limitations had expired); *Rheaume v Vandenberg*, 232 Mich App 417; 591 NW2d 331 (1998) (*see supra*); *Neal v Oakwood Hospital Corporation*, 226 Mich App 701; 575 NW2d 68 (1997) (plaintiff failed to fully comply with notice requirements before filing suit); *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996) (plaintiff failed to provide defendants with proper notice prior to filing suit).

Muskegon Heights, 36 Mich App 264; 193 NW2d 264 (1971). However, it is important to emphasize that this line of municipality negligence cases does not impact this case for two (2) reasons. First, the purposes of the "early notice" provisions in negligence claims against municipalities are different from the purposes sought to be achieved by the notice provisions under the medical liability Tort Reform Act of 1993. Early notice in municipal negligence cases enables a potential defendant to conduct and independent, fresh investigation on its own and to preserve evidence for a later defense. That purpose is fairly served by a simple, undetailed notice. Apparently, the Courts in *Brown, Meredith* and *Hussey* concluded that substantial compliance with a detailed early notice provision was sufficient to comply with the statutory purpose, particularly since the notice was required at such an early stage. These courts were obviously uncomfortable with denying potential plaintiffs their "day in court" by failing to comply with a detailed early notice.

The medical malpractice notice of intent requirement serves a far different purpose. MCL 600.2912b is a much more specific statute. Not only are medical liability plaintiffs able to provide notice on the eve of the expiration of the statute of limitations (thereby extending the limitations period for up to 182 days), but as noted, the notice provisions are intended to specifically outline the nature of the claim in some detail so that the potential defendant(s) know exactly what acts of negligence he, she or it is alleged to have committed. Accordingly, the issue before this Honorable Court in the instant case does not concern an early notice provision which has the effect of denying plaintiff his or her day in court based on an early technical requirement as in *Brown, Meredith* and *Hussey, supra.* As noted, a proper MCL 600.2912b(4) Notice of Intent actually acts to **extend** the statute of limitations in medical liability claims.

This reasoning similarly applies to *Dozier v State Farm Mutual Insurance Company*, 95 Mich App 121, 130; 290 NW2d 408 (1980), cited by the Court of Appeals in its initial decision in this case. *Roberts v Mecosta Co General Hosp*, 240 Mich App 175, 183; 610 NW2d 285 (2000). As this Honorable Court will note, *Dozier* involved a pre-suit notice under the no-fault act. As such it is analogous to the notice cases of *Brown, Meredith* and *Hussey, supra*, which clearly serve a distinct statutory purpose. In addition, the *Dozier* Court went out of its way to limit it's ruling to that particular case based upon an insurance company's response to that plaintiff's notice:

> Nevertheless, in view of the defendant's acknowledgment of plaintiff's letter (rather than denial of liability or a request for additional information) and its adjuster's request to "forward all specials you have in your file regarding this loss" we are persuaded that defendant waives its rights to assert the insufficiency of the notice . . . Defendant's letter of March 9, 1997, appeared to acknowledge its liability, or at least did not dispute it.
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> [*Dozier, supra* at 130]

Obviously, the facts in *Dozier* suggest that the insurance company made some overture of settlement or acknowledgement of liability, none of which occurred in the instant action.

Finally, it should be emphasized that requiring full compliance with the provisions of MCL 600.2912b(4) would not leave plaintiff without remedies. It would not abrogate any rights a plaintiff may have in a cause of action, nor would it divest a plaintiff of his or her access to courts. It is not disputed that complaining parties have complete control over the timely filing of medical liability actions. All a plaintiff would have to do is file a Notice of Intent compliant with the provisions set forth in MCL 600.2912b(4), as has been the practice of most of the plaintiff firms to date. These are not exacting, insurmountable or particularly taxing requirements by any standard, nor do these requirements act as a "trap," as plaintiff would suggest. They simply require that a plaintiff provide some basic information giving notice to a

potential defendant of claims against him or her. It should be noted that, in practice, most notices of intent are in full compliance with MCL 600.2912b(4). Litigation as to the adequacy of a Notice of Intent in medical liability actions is the very limited exception, not the rule. Moreover, it is certainly arguable that if a prospective plaintiff does not possess even this basic information, he or she should not be squandering valuable time and resources initiating a lawsuit in the first place.

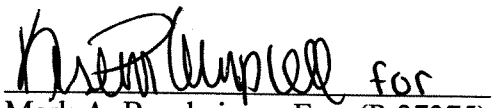
Based on the foregoing, there can be no doubt that the failure to fully comply with the clear and unambiguous requirements of the statutory provisions set forth in MCL 600.2912b(4) constitutes a violation of the statute. Statutory construction does not permit anything less than full compliance with the clear and unambiguous provisions of MCL 600.2912b(4). This is an instance in which the Legislature could not have imposed more clear or precise requirements. Consequently, Defendant Atkins strongly urges this Court to refrain from judicially legislating some lesser standard of compliance and follow the well-established precedent in this area. Once again, Defendant Atkins requests this Honorable Court to reverse the clearly erroneous and potentially disastrous decision of the Court of Appeals.

VI. RELIEF REQUESTED

Based on the facts and arguments set forth above, Defendant-Appellant Michael L. Atkins, M.D. respectfully requests this Honorable Court to reverse the August 27, 2002 opinion of the Michigan Court of Appeals and affirm the Opinion of the Mecosta County Circuit Court dated May 6, 1998, and its subsequent "Order of Dismissal," with prejudice, dated June 17, 1998, together with any other relief this Honorable Court deems just and reasonable.

Respectfully Submitted:

BURNHEIMER + COMPANY, P.C.

By:  for
Mark A. Burnheimer, Esq. (P-37375)